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No. 00-339

Supreme Court, U.S.
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In The

Supreme Court of the United States

ANNIE KELLY, et al.,

Petitioners,

v.

AL FURAT PETROLEUM COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED RESTATED

1. Should this Court review and/or clarify the requirements for proving that an entity is an "organ of a foreign state" under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et seq., when all the parties below asked the Fifth Circuit to consider and apply the same factors?

2. Should this Court review the extent to which a plaintiff is entitled to conduct discovery on FSIA immunity issues, when Petitioners did not diligently pursue their right to discovery in the trial court?

3. Should this Court address the requirements for proving that an entity is majority-owned by a foreign state, including whether the FSIA allows for indirect ownership of an entity by a foreign state and whether 50% ownership of an entity can constitute majority ownership, when the Fifth Circuit expressly declined to reach those issues?

4. Should this Court review the Fifth Circuit's decision regarding the "commercial activities" exception to FSIA immunity, given that the Fifth Circuit's decision follows *Saudi Arabia v. Nelson*, 507 U.S. 379 (1993) and there is no conflict between the Fifth Circuit and any other Circuit Court?

5. Does Petitioners' failure to challenge the Fifth Circuit's personal jurisdiction rulings – including the determination that Al Furat did not have sufficient "minimum contacts" with Texas – supply an independent basis for affirming the judgment dismissing Al Furat?

PARTIES TO THE PROCEEDING

The parties to the proceeding below are as follows:

1. **Petitioners/Plaintiffs**
   a. Annie Kelly
   b. Jeanette Carpenter
   c. Kathy Strong, individually and as next friend of John Strong

2. **Respondent/Defendant**
   a. Al Furat Petroleum Company

3. **Other Defendants Below**
   a. Syria Shell Petroleum Development B.V.
   b. N.V. Koninklijke Nederlandsche Petroleum Maatschappij (Royal Dutch Petroleum Company).
   c. The "Shell" Transport and Trading Company plc.

4. **Other interested parties**
   a. Syrian Petroleum Company (parent company of Al Furat Petroleum Company).
   b. Various intermediate holding companies and subsidiaries of the Royal Dutch/Shell Group of companies.

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STATEMENT OF THE CASE

This wrongful death action arises out of an oil well fire that occurred in Syria in June 1995. The facts giving rise to the well fire, and the circumstances under which John Wright of Wright Boots & Coots and three firefighters from Boots & Coots traveled to Syria to perform well blowout and well killing services, are accurately set out in the Fifth Circuit's opinion below. *See* Pet. App. A-4 – A-6.

Plaintiffs, survivors of the three Boots & Coots firefighters who were killed in the oil well fire, initially filed two separate, Texas state court lawsuits in June 1997 against a slew of defendants. Included among those sued were various Texas defendants that had nothing to do with the lawsuit (and which had been fraudulently joined for purposes of destroying diversity jurisdiction), as well as the following Foreign Defendants:

> (a) Al Furat Petroleum Company ("Al Furat"), which operated the well in Syria and was created by and continues to be controlled by the foreign state of Syria (V-10:275);
>
> (b) Syria Shell Petroleum Development B.V. ("Syria Shell"), an Al Furat minority shareholder (31.25%) organized and existing under the laws of The Netherlands, whose principal place of business is Syria (V-10:229, 275);
>
> (c) Royal Dutch Petroleum Company ("Royal Dutch"), a Netherlands holding company having nothing to do with the accident in this case,

> but which has ownership and investment interests, directly and indirectly, in a number of companies known as the "Royal Dutch/Shell Group of companies" (V-10:226); and
>
> (d) The Shell Transport and Trading Company plc ("Shell Transport"), a holding company organized and existing under the laws of England, which, like Royal Dutch, had nothing to do with the well fire in Syria but holds direct and indirect ownership interests in the Royal Dutch/Shell Group of companies (V-10:221).

Plaintiffs took exactly the kind of "lets-sue-anybody-and-maybe-figure-it-out-later" approach condemned in *Ebrahim v. Shell Oil Co.*, 847 F. Supp. 65, 68 (S.D. Tex. 1994).

Defendants removed the state court lawsuits to federal court (where they were eventually consolidated), on the ground that Al Furat was a "foreign state" under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq. ("FSIA"). V-8:147-48; V-10:48-49. On July 25, 1997, shortly after the cases had been removed, Al Furat, Syria Shell, Royal Dutch, and Shell Transport moved, with supporting affidavits, to dismiss Plaintiffs' claims on the grounds that (1) Al Furat, a foreign state, is immune from suit under the Foreign Sovereign Immunities Act, and (2) the court had no personal jurisdiction over any of the Foreign Defendants, including Al Furat. V-8:183-87; V-10:113-16. The Foreign Defendants also moved to stay discovery pending disposition of their motions to dismiss. V-9:401-07. These motions were referred by the district court to Magistrate Judge Mary Milloy for disposition. V-5:1056-59; V-6:631; V-9:509, 401-07.

Even though Plaintiffs knew from the outset that the Foreign Defendants were resisting discovery pending disposition of their motions to dismiss, Plaintiffs did not issue any formal discovery requests to the Foreign Defendants for a number of months. Prior to the discovery conference mandated by FED. R. CIV. P. 26(f), Plaintiffs filed a motion to conduct discovery. V-9:334. But Plaintiffs never obtained a ruling on that motion. On November 10, 1997, shortly after the Rule 26(f) conference, Plaintiffs filed a Joint Discovery Plan under Rule 26(f), in which they indicated that they were "ready to propound discovery to Defendants immediately." V-4:1261. Yet once again, Plaintiffs failed to propound any specific discovery requests for several months – instead filing only a generalized motion to conduct discovery on FSIA issues. V-3:1481.

Indeed, it was not until January 1998 – some six months after the Foreign Defendants filed their motions to dismiss and after Plaintiffs had been told that a decision by Magistrate Milloy was imminent – that Plaintiffs propounded their first discovery request. On January 19, 1998, Plaintiffs' noticed the deposition of John Wright of Wright Boots & Coots. V-3:1548. Although the Foreign Defendants moved for a protective order, the magistrate judge denied the motion and permitted Plaintiffs to depose John Wright on issues relating to personal jurisdiction. V-3:1563, 1567.

While the magistrate judge permitted Plaintiffs to take the deposition of John Wright, Plaintiffs did not diligently seek to pursue any other discovery and wholly failed to make the requisite showing that they were entitled to discovery on immunity issues. At a hearing held

on January 29, 1998, when Plaintiffs again were making general requests that they be allowed to conduct discovery, the magistrate judge pointed out that "you didn't do any discovery." V-12:37. In response to the argument of Plaintiffs' counsel that "we haven't been allowed to do any discovery," the magistrate replied: "Well, but you haven't taken the steps to do any, so far as I know. I mean, . . . the first thing that came to my attention was the deposition of Mr. Wright, which I listened to both sides and I said go ahead and do it." V-12:40-41.

In fact, as of mid-February 1998, the sum total of the formal discovery conducted by Plaintiffs was as follows:

1.	Interrogatories	0
2.	Requests for admissions	0
3.	Requests for production of documents	0
4.	Depositions noticed	1

And the one deposition that had been noticed was that of John Wright, which the magistrate judge allowed to proceed.

In two opinions dated February 24 and 26, 1998, the magistrate judge rejected Plaintiffs' generalized requests to conduct additional discovery and recommended that (a) Plaintiffs' claims against Al Furat be dismissed under the Foreign Sovereign Immunities Act and (b) Plaintiffs' claims against Syria Shell, Royal Dutch, and Shell Transport be dismissed for lack of personal jurisdiction. V-2:1838-67, 1868-1900. After Plaintiffs filed objections to the magistrate's recommendations, (V-2:2029-36, 2037-48), the district court entered two, one-page orders on March 31, 1998, adopting the magistrate judge's order on the

discovery issue and the magistrate's recommendation that the case be dismissed. V-1:2096-97. Plaintiffs twice moved for reconsideration and then appealed when their second motion for reconsideration was denied. V-1:2121-23, 2153, 2184-95, 2231, 2232-34.

On appeal, the Fifth Circuit affirmed the district court's judgment. With respect to the district court's ruling that Al Furat was immune under the FSIA, the Fifth Circuit held that Al Furat had proven that it was an "organ" of a foreign state under 28 U.S.C. § 1603(b)(2). Pet. App. A-10 – A-15. Because it concluded that Al Furat was an "organ" of a foreign state, the Fifth Circuit declined to address whether Al Furat was majority-owned by a foreign state – the second basis for sovereign immunity under section 1603(b)(2). Pet. App. A-9. The Fifth Circuit further held that the magistrate judge had *not* abused her discretion in denying Plaintiffs further time to conduct discovery on FSIA issues because Plaintiffs had not been diligent in seeking discovery and had not made the requisite showing to demonstrate that they were entitled to discovery. Pet. App. A-15 – A-22. Finally, the Fifth Circuit concluded that the commercial activities exception to immunity under the FSIA did not apply because Plaintiffs' wrongful death action was not "based upon" a commercial activity carried on in the United States by Al Furat. Pet. App. A-22 – A-26.

With respect to the remaining Foreign Defendants, including Syria Shell (a minority shareholder of Al Furat), and Royal Dutch and Shell Transport (the ultimate parent companies for various Shell entities), the Fifth Circuit concluded that they were correctly dismissed for lack of personal jurisdiction. The Fifth Circuit had little trouble

rejecting Plaintiffs' conclusory allegations that Royal Dutch and Shell Transport were subject to the general jurisdiction of Texas based on the fact that Shell Oil Company, a separate entity, has its principal place of business in Texas. As the Fifth Circuit recognized, Plaintiffs had adduced no evidence to support their double-veil piercing theory of personal jurisdiction. Plaintiffs had adduced no evidence that Royal Dutch and Shell Transport were the alter egos of Shell Petroleum, the owner of Shell Oil Company, and no evidence that Shell Petroleum was the alter ego of Shell Oil Company. Pet. App. A-32 – A-35.

As for Syria Shell (the minority shareholder of Al Furat), the Fifth Circuit held that Al Furat's contacts with Texas – including entering into a contract with a Texas entity (Wright Boots & Coots) and signing a work order with another Texas entity (Boots & Coots) – could not be attributed to Syria Shell. However, the Fifth Circuit then proceeded to conclude that, even "assuming Al Furat's contacts with Texas . . . are properly attributable to Syria Shell, specific jurisdiction does *not* exist for it, because [Plaintiffs'] claims do not arise out of those contracts." Pet. App. A-29 (emphasis in original). Instead, as the Fifth Circuit recognized, Plaintiffs' claims "arise out of alleged tortious acts committed by Al Furat in Syria." Pet. App. A-29. This ruling is important, as it is tantamount to a holding that Al Furat's contacts with Texas are insufficient to give a Texas court personal jurisdiction over Al Furat – even if Al Furat were not immune under the FSIA.

In their petition for a writ of certiorari, Plaintiffs do not challenge the Fifth Circuit's personal jurisdiction

rulings. Plaintiffs only challenge the Fifth Circuit's decision that Al Furat is entitled to immunity under the FSIA.

REASONS FOR DENYING THE WRIT

I. Plaintiffs Never Argued Below That a "Clearer Test" Was Needed for Determining Whether an Entity Is an "Organ of a Foreign State" Under the FSIA.

Plaintiffs do not even purport to identify any conflict between the Fifth Circuit's decision holding that Al Furat is an organ of a foreign state and any other decision from another Court of Appeals or from this Court. Indeed, at least one other court has already held that Al Furat is immune from suit under the FSIA. *See Ebrahim v. Shell Oil Co.*, 847 F. Supp. 65, 67 (S.D. Tex. 1994).

Nonetheless, Plaintiffs tell this Court that this case presents important issues concerning the proper definition of the term "organ of a foreign state" in 28 U.S.C. § 1603(b)(2) and specifically ask this Court "to fashion a clearer test for determining whether an entity is an organ of a foreign state." Pet. at 7-8. Plaintiffs complain about the Fifth Circuit's application of the factors set out in *Supra Medical Corp. v. McGonigle*, 955 F. Supp. 374, 379 (E.D. Pa. 1997), to determine that Al Furat is an organ of a foreign state. Pet. at 9. However, Plaintiffs themselves cited and relied on the *Supra Medical* factors in their brief to the Fifth Circuit – and even argued that "the trial court acknowledged the applicability of the five *Supra Medical* factors, but wholly ignored most of them in summarily determining that Al Furat was an organ of the Syrian government." Brief of Appellants at 15.

In fact, it was Plaintiffs' and Defendants' reliance on the *Supra Medical* factors that led the Fifth Circuit to discuss and apply them. As the Fifth Circuit's opinion states:

> In holding Al Furat is an organ of Syria, the district court applied the *Supra* factors, *and they are utilized by both sides here*. Accordingly, we shall apply them.

Pet. App. A-11 (emphasis added). Thus, Plaintiffs' argument to the Fifth Circuit was *not* that a different or "clearer" test should be applied in determining whether an entity is an organ of a foreign state. Rather, Plaintiffs' argument to the Fifth Circuit was that the trial court made erroneous fact findings and/or misapplied the *Supra Medical* factors, which are not sufficient bases for invoking this Court's certiorari jurisdiction. *See* SUP. CT. R. 10 (petition "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Plaintiffs should not be permitted to change course now.

Plaintiffs ask a number of questions about the *Supra Medical* factors in their petition, including the following: (1) Are any of the factors absolutely determinative as to organ status? (2) Are any of the factors more important or less important than others in the determination of organ status? (3) How many of the factors are required to be satisfied in order for an entity to obtain organ status? (4) What standard of proof should apply to an entity seeking to prove these factors? Pet. at 9-10. While these abstract questions may well be interesting, they are not questions that Plaintiffs raised below. This Court should not consider those questions now.

The Fifth Circuit correctly concluded, relying on the factors from *Supra Medical* cited by both parties, that Al Furat had adduced sufficient proof that it was an organ of the Syrian Arab Republic. In deciding that there was sufficient evidence of the first *Supra Medical* factor – whether the entity was created for a national purpose – the Fifth Circuit properly held:

> Olsen's declaration establishes that Al Furat was created by a Syrian government decree for a national purpose: the development and exploration of Syria's mineral resources, pursuant to Syria's policy that all minerals under the surface remain the property of Syria and will be explored and developed in a manner that will best serve the interests of Syria.

Pet. App. A-14.

The Fifth Circuit also properly determined that there was a sufficient showing that the Syrian state actively supervised Al Furat and required Al Furat to hire public employees. As the Fifth Circuit explained, "the evidence that Syrian Petroleum Company [wholly owned by the Syrian state] appoints four of the eight Al Furat board members, including the chairman, and that such appointees have invariably been high-level Syrian government officials, supports a determination of organ status under the second and third *Supra* factors." Pet. App. A-14.

Finally, the Fifth Circuit held that the evidence was sufficient to show that "Al Furat has the exclusive right to explore and develop Syria's identified petroleum reserves, which are the property of the Syrian Government." Pet. App. A-14 – A-15. Plaintiffs chastise the Fifth Circuit and the trial court for inferring that Al Furat's

right was exclusive, based on the evidence showing (1) that Al Furat's objective was to develop identified petroleum reserves within the Syrian Arab Republic and (2) that Syrian Petroleum had the right to handle all of the works relating to the discovery and exploration of petroleum reserves in Syria. Pet. at 17 n.1. Yet Plaintiffs do not dispute that the inference drawn by the trial court (and the Fifth Circuit) was a plausible one; Plaintiffs just complain that the trial court did not make a contrary inference that Al Furat's right was not exclusive. Pet. at 17 n.1. Nor do Plaintiffs dispute that, in ruling on a motion to dismiss for lack of subject matter jurisdiction – which is what the trial court was considering when it decided the FSIA issue – the trial court may base its decision on "the complaint supplemented by undisputed facts *plus the court's resolution of disputed facts.*" Pet. App. A-7 (emphasis added) (citing *Robinson v. TCI/US West Cable Communications Inc.*, 117 F.3d 900, 904 (5th Cir. 1997)). That is exactly what occurred here.

Under these circumstances, Plaintiffs have shown no error in the trial court's or the Fifth Circuit's application of the *Supra Medical* factors. And Plaintiffs have certainly not demonstrated why this Court should review the Fifth Circuit's application of the *Supra Medical* factors to the particular facts of this case.

II. This Court Should Not Address the Discovery Issue Raised by Plaintiffs, Especially Where Plaintiffs Did Not Diligently Pursue Discovery.

Plaintiffs have also asked this Court to "clarify what discovery is allowed" on the issue of whether an entity is

an agency or instrumentality of a foreign state. Pet. 15. But, as the Fifth Circuit held, Plaintiffs failed to "diligently seek discovery" and failed to "allege[ ] specific facts crucial to immunity which demonstrated a need for discovery." Pet. App. A-22. Accordingly, this Court need not address the abstract question presented by Plaintiffs on the extent to which discovery should be permitted under the FSIA.

Plaintiffs characterize the Fifth Circuit's holding on the discovery issue as "remarkable," and then proceed to list a number of "facts" showing that they preserved their right to seek discovery on FSIA issues. Pet. 19-20. However, Plaintiffs' list of "facts" paints a misleading and incomplete picture of the extent to which Plaintiffs sought to obtain discovery from Defendants.

A. Plaintiffs Ignore Their Delay in Seeking Discovery After the Rule 26(f) Conference.

Plaintiffs wholly ignore the length of time during which they could have sought – but did not seek – to pursue discovery. On July 25, 1997, shortly after the state court lawsuits were removed to federal court, Defendants filed their motions to dismiss, claiming (among other things) that Al Furat was immune under the FSIA. V-10:116, 148; V-8:187, 221. While Plaintiffs moved to conduct discovery prior to the conference mandated by FED. R. CIV. P. 26(f) (V-9:334), and Defendants thereafter moved to stay discovery (V-9:407), neither side obtained rulings on those motions prior to the Rule 26(f) conference, which was held on November 7, 1997. V-4:1263. Thus, prior to the Rule 26(f) conference, there was nothing that expressly permitted Plaintiffs to take discovery;

but there was no order preventing Plaintiffs from taking discovery either.

Once the Rule 26(f) conference was held, of course, Plaintiffs were free to take discovery. Indeed, on November 10, 1997, Plaintiffs filed a Joint Discovery/Case Management Plan under Rule 26(f), stating that they "[we]re ready to propound discovery to Defendants immediately." V-4:1261. Despite this representation, however, Plaintiffs did not seek to take any discovery, by noticing a deposition, sending out interrogatories or requests for admissions, or by making document requests. As the Fifth Circuit explained, Plaintiffs conceded at oral argument that "they had *not* been prohibited from conducting discovery between [the] 7 November 1997 Rule 26(f) conference and 24 February 1998, when the magistrate judge made her discovery recommendation." Pet. App. A-18 (emphasis in original). Moreover, although Plaintiffs made generalized requests to conduct discovery after the November 7, 1997 Rule 26(f) conference, "they did *not* formally request it until 19 January 1998 (over two months after the Rule 26(f) conference), when they noticed the deposition of [John] Wright" of Wright Boots & Coots. Pet. App. A-18 (emphasis in original). Finally, Plaintiffs' first written discovery (*e.g.*, interrogatories, requests for admissions, or request for the production of documents) was not propounded until February 17, 1998 – over *three* months after the Rule 26(f) conference. Pet. App. A-20 – A-21.

Plaintiffs' contention that the magistrate "never once stated that the Plaintiffs failed to use diligence in seeking discovery" is incorrect. Pet. 20. At a hearing held shortly before the magistrate ruled on Defendants' motions to

dismiss, the magistrate judge was obviously frustrated with Plaintiffs' failure to request specific discovery. V-12:37. The magistrate judge expressly pointed out to Plaintiffs' counsel as follows:

> [Y]ou haven't taken the steps to do any [discovery], so far as I know. I mean, . . . the first thing that came to my attention was the deposition of Mr. Wright, which I listened to both sides and I said go ahead and do it.

V-12:40-41. Clearly, then, the magistrate judge was concerned about Plaintiffs' lack of diligence in pursuing discovery.

B. Plaintiffs' Efforts to Excuse Their Lack of Diligence Are Unavailing.

Plaintiffs offer several excuses for their delay in seeking discovery from Defendants. None has merit.

First, Plaintiffs wrongly argue that the district court's general scheduling order, which was entered in early December 1997 and set August 1, 1998 as the discovery cutoff, permitted them to wait until July 1998 to request discovery on the FSIA issues. Pet. 19; V-3:1484. However, the August 1, 1998 discovery deadline was the *trial* discovery deadline; it did not give Plaintiffs the right to sit back and wait until July of 1998 to take discovery on FSIA issues – especially given the fact that Al Furat's motion to dismiss was already pending (and had been pending for over four months) at the time the scheduling order was entered. In fact, at the hearing on the scheduling order, the district court specifically admonished Plaintiffs to "do whatever you [want] with your time." V-11:14. Plaintiffs

simply chose, for whatever reason, not to make any formal discovery requests with the time that they had been given.

Plaintiffs also suggest that their lack of diligence should be excused because the "Defendants had requested that discovery would be stayed and indicated that they would oppose every attempt at discovery prior to a ruling on their dismissal." Pet. 19. However, the Fifth Circuit correctly rejected the argument that "it would have been an unnecessary waste of effort to serve specific discovery requests or noticed depositions." Pet. App. A-21. The Fifth Circuit reasoned that "[s]uch alleged futility does *not* excuse *not* making specific discovery requests, and obtaining a ruling in the event of objection by Al Furat." Pet. App. A-21 (emphasis in original).

Plaintiffs further suggest that their lack of diligence may be excused because they made generalized requests to conduct discovery. Pet. 19; V-9:331-34; V-3:1479-81, 1575-81. However, it has long been the rule that a request for additional time to conduct discovery to oppose a dispositive motion (such as a motion for summary judgment) need not be granted when the party opposing the motion simply relies on vague assertions that additional discovery will produce needed, but unspecified facts. *See Access Telecom, Inc. v. MCI Telecommunications Corp.*, 197 F.3d 694, 719-20 (5th Cir. 1999); *Securities & Exchange Comm'n v. Recile*, 10 F.3d 1093, 1098 (5th Cir. 1993); *Reese v. Anderson*, 926 F.2d 494, 499 n.5 (5th Cir. 1991); *Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d 129, 137 (5th Cir. 1987).

While Plaintiffs filed generalized motions for discovery, Plaintiffs never issued any formal discovery requests until the eve of the magistrate's decision. Under these circumstances, this Court should decline to address the discovery issue presented by Plaintiffs' petition for a writ of certiorari. The trial court did not abuse its discretion in denying Plaintiffs additional time to conduct discovery.

III. This Court Need Not Address the Majority Ownership Issues Raised by Plaintiffs Where the Fifth Circuit Declined to Do So and No Conflict Is Presented.

Plaintiffs next argue that this case "presents questions regarding the majority ownership clause" of the definition of "agency or instrumentality of a foreign state" in 28 U.S.C. § 1603(b)(2). Pet. 22. Plaintiffs identify the following two issues relating to the majority ownership clause that are supposedly raised by this case:

1. *The "tiering" or "indirect ownership" issue – i.e.*, whether a company owned by an agency or instrumentality of a foreign state, as opposed to being owned directly by a foreign state, can be an agency or instrumentality of a foreign state; and

2. *The "50% – majority" issue – i.e.*, whether a company can be an agency or instrumentality of a foreign state when the foreign state owns 50% of the company's shares, and two other entities own the minority shares in the company.

Plaintiffs tell this Court that it should reach the "tiering" or "indirect" ownership issue because there is a

conflict between the Ninth and Seventh Circuit on this issue. *Compare Gates v. Victor Fine Foods*, 54 F.3d 1457, 1461-63 (9th Cir. 1995) (holding that entities indirectly owned by a foreign state, through an agency or instrumentality of a foreign state, cannot themselves qualify as an agency or instrumentality of a foreign state) *with In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932, 939-41 (7th Cir. 1996) (holding that an entity indirectly owned by a foreign state qualifies as an agency or instrumentality of a foreign state under the plain language of 28 U.S.C. § 1603(a)). However, Plaintiffs concede, as they must, that "[b]ecause it decided that Al Furat was an organ of a foreign state, the Fifth Circuit did not reach the [tiering] issue in this case." Pet. 23; *see also* Pet. App. A-9 ("because we conclude that Al Furat is an organ of a foreign state, we need *not* consider § 1603(b)(2)'s ownership requirements").

Thus, contrary to Plaintiffs' suggestion, this case does not "require the court to resolve a separate conflict between the Seventh Circuit Court of Appeals and the Ninth Circuit Court of Appeals regarding the construction of the same federal statute." Pet. 7. The alleged "conflict" is not presented by this case at all, because the Fifth Circuit decided not to address the tiering issue below. This Court's statement in *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959) is particularly instructive here:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial.

> Resolution here of [the tiering issue] can await a day when the issue is posed less abstractly.

Nor is the other majority ownership issue raised by Plaintiffs ripe for this Court's consideration – namely, whether an entity that is owned 50% by a foreign state can be a majority-owned agency or instrumentality under the FSIA. While that question may be an interesting one, it is one that the Fifth Circuit expressly declined to address. Once again, then, resolution of that issue "can await a day when [it] is posed less abstractly." *The Monrosa*, 359 U.S. at 184.

IV. Plaintiffs Have Provided This Court With No Valid Reason to Review the Fifth Circuit's Decision on the "Commercial Activities" Exception to FSIA Immunity.

A. The Fifth Circuit Correctly Followed this Court's Decision in *Saudi Arabia v. Nelson*.

Plaintiffs argue that this Court should grant their petition to address the "legal analysis" that should be applied by the courts in determining whether a claim is "based upon" commercial activities carried on in the United States, as required by 28 U.S.C. § 1605(a)(2) (the "commercial activities" exception). However, in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), this Court thoroughly addressed and discussed the "legal analysis" that should apply in determining whether a claim is "based upon" commercial activities in the United States. Plaintiffs' claim that the courts of appeal "have struggled with" the "based upon" test established by *Nelson* is wholly without merit. Pet. 28. The Fifth Circuit had little

trouble applying the test mandated by *Nelson* in this case – and correctly held that the commercial activities exception does not apply here.

In *Nelson*, the plaintiff alleged that he was recruited in the United States by a foreign state in Saudi Arabia and that, once in Saudi Arabia, he was injured (even tortured) by the Saudi government. 507 U.S. at 352-54. This Court rejected the argument that such facts fell within the first clause of the commercial activities exception to the FSIA, explaining that, while Saudi Arabia's commercial activities "led to the conduct that eventually injured" the plaintiff, the commercial activities were "not the basis for" the plaintiff's suit. *Id.* at 357. This Court pointed out that the plaintiff in *Nelson* had "not . . . alleged breach of contract, . . . but personal injuries caused by petitioners' intentional wrongs and by petitioners' negligent failure to warn." *Id.* Thus, the Court held that "[t]hose torts, and not the arguably commercial activities that preceded their commission, form[ed] the basis for the [plaintiff's] suit." *Id.*

Nelson is controlling here. In this case, as in *Nelson*, Plaintiffs allege that they were in a sense "recruited" in the United States to perform services in a foreign country. Further, while the commercial activity in the United States by Al Furat, in entering into a contract with Wright Boots & Coots and signing a work order with Boots & Coots, may have "led to" the conduct that injured Plaintiffs' decedents, that commercial activity is not the "basis" for Plaintiffs' lawsuit. Instead, the basis for Plaintiffs' lawsuit, as is readily apparent from their live pleading, is that Al Furat was negligent in performing and failing to perform various acts *in operating the well in*

Syria. V-3:1674-76; V-2:1760-62. While Plaintiffs alleged, in their live pleadings, that they were third party beneficiaries of the contracts between Al Furat and Wright Boots & Coots and Boots & Coots, as the Fifth Circuit pointed out, Plaintiffs abandoned that claim on appeal. Pet. App. A-25. Thus, just as in *Nelson*, Plaintiffs do "not . . . allege[ ] breach of contract," but personal injuries caused by Al Furat's alleged tortious conduct that occurred *in Syria*. Under such circumstances, Plaintiffs' claims are not "based upon" commercial activities carried out by Al Furat in the United States.

Plaintiffs nonetheless maintain that their claims are "based upon" commercial activities carried on by Al Furat in the United States because, the argument goes, Plaintiffs' negligence claims are based on the breach of a "duty" that was created by the contract between Al Furat and Wright, Boots & Coots. As the Fifth Circuit correctly recognized, however, because Plaintiffs' decedents were "neither parties to, nor third-party beneficiaries of, that contract, any duty ow[e]d by Al Furat to [Plaintiffs'] decedents arose *by operation of law, independent of the existence of that contract*." Pet. App. A-26 (emphasis added). Accordingly, this Court's decision in *Nelson* is controlling.

B. Contrary to Plaintiffs' Contention, the Fifth Circuit's Decision Here Does Not Conflict with the Ninth Circuit's Decision in *Sun v. Taiwan*.

Plaintiffs do not even argue that the Fifth Circuit's decision here conflicts with this Court's decision in

Nelson. But Plaintiffs do contend that there is a reviewable "conflict" between the Fifth Circuit's decision in this case and the Ninth Circuit's decision in *Sun v. Taiwan*, 201 F.3d 1105 (9th Cir. 2000), which was a wrongful death action arising out of a drowning that occurred on a Taiwan beach during a tour sponsored by the Taiwan government. Plaintiffs are wrong.

In *Sun*, the Ninth Circuit held, following this Court's *Nelson* decision, that the district court had correctly dismissed the plaintiffs' claims for "negligent selection of the beach, negligent supervision, and failure to warn." *Id.* at 1110. In other words, those claims were not "based upon" any commercial activity carried on by the Taiwan government in the United States. At the end of its opinion, the Ninth Circuit did remand part of the plaintiffs' claims – in particular, their negligent misrepresentation claims, which were predicated on the notion that under California law, Taiwan (as a tour organizer) had an affirmative duty to disclose known information concerning prospective dangers. *Id.* However, contrary to Plaintiffs' contention here, the Ninth Circuit in *Sun* did *not* hold that the plaintiffs' negligent misrepresentation claims were "based upon" commercial activity carried on in the United States. Rather, the Ninth Circuit held that "the district court should have the opportunity to review [the plaintiffs'] claim first in order to determine whether, as currently cast, it is based on commercial activity that took place in the United States." *Id.* No conflict is presented, because the Ninth Circuit simply did not decide the issue.

V. The Judgment Affirming the Dismissal of Al Furat Is Independently Supported by the Fifth Circuit's Unchallenged Personal Jurisdiction Rulings.

Even if Al Furat were not immune from suit under the FSIA, the judgment of dismissal as to Al Furat would have to be affirmed on the ground that the district court lacked personal jurisdiction over Al Furat. Indeed, in affirming the dismissal as to Syria Shell (one of the minority shareholders of Al Furat), the Fifth Circuit held that, "assuming Al Furat's contacts with Texas . . . are properly attributable to Syria Shell, specific jurisdiction does *not* exist for it, because [Plaintiffs'] claims do *not* arise out of those contracts." Pet. App. A-29 (emphasis in original). Instead, as the Fifth Circuit recognized, Plaintiffs' claims "arise out of alleged tortious acts committed by Al Furat in Syria." Pet. App. A-29. Thus, in affirming the dismissal on personal jurisdiction grounds as to Syria Shell, the Fifth Circuit held that *Al Furat's* contacts with Texas, which consisted of contracting with a Texas resident in Syria for the provision of well blowout and well killing services to be performed in Syria, were not sufficient to permit the exercise of personal jurisdiction over Syria Shell (or, by implication, Al Furat).

The Fifth Circuit's decision regarding the insufficiency of Al Furat's contacts with Texas is well-supported by existing law. This Court has recognized that a nonresident's contract with an out-of-state party is alone insufficient to establish minimum contacts – even when the out-of-state party is suing for breach of contract. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79 (1985). Indeed, in an action for breach of contract, "the combination of mailing payments to the forum state, engaging in

communications surrounding the execution and performance of a contract, and the fact that a nonresident enters into a contract with a resident are insufficient to establish the requisite minimum contacts." *Gundle Lining Constr. Corp. v. Adams County Asphalt*, 85 F.3d 201, 205 (5th Cir. 1996); *see also Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1069 (5th Cir. 1992); *Stuart v. Spademan*, 772 F.2d 1185, 1193 (5th Cir. 1985); *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1028-29 (5th Cir. 1983).

As already explained, Plaintiffs here are not suing for breach of any contract, but for alleged torts committed in Syria. Thus, their claims do not arise out of or directly relate to any contracts executed with a Texas resident. The Fifth Circuit's decision in *Aviles v. Kunkle*, 978 F.2d 201 (5th Cir. 1992), involving claims asserted by Texas migrant workers against Ohio defendants, is on point. There, the court held that personal jurisdiction over Ohio defendants was lacking in Texas, even though the Ohio defendants had recruited the migrant workers in Texas, because the Plaintiffs' claims were not "based upon any contract, tort or recruitment in Texas, but upon the alleged violation of two federal statutes arising solely out of their employment in Ohio." *Id.* at 204-05. Similarly, in this case Plaintiffs' claims are not based on and did not arise from any contract, tort, recruitment in Texas, but instead arose from alleged tortious acts committed wholly in Syria.

Plaintiffs have disavowed any intent to challenge the Fifth Circuit's judgment in favor of the defendants other than Al Furat, including Syria Shell. Pet. ii. In other words, Plaintiffs have abandoned any challenge to the personal jurisdiction rulings made by the Fifth Circuit

concerning Syria Shell – which includes the holding that Plaintiffs' claims do not arise out of any contacts by Al Furat with Texas. Accordingly, under the Fifth Circuit's decision, the district court's judgment of dismissal in favor of Al Furat would have to be affirmed in any event because personal jurisdiction is lacking over Al Furat.

CONCLUSION

For the foregoing reasons, Respondent Al Furat respectfully requests that the Plaintiffs' petition for a writ of certiorari be denied.

Respectfully submitted,

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